Supreme Court, U.S.
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No. 99-1248

IN THE

Supreme Court of the United States

COOK GROUP INCORPORATED, WILSON-COOK MEDICAL INC., COOK INCORPORATED, VANCE PRODUCTS INCORPORATED and SABIN CORPORATION,

Petitioners,

v.

JON S. WILSON and WILTEK MEDICAL, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

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STATEMENT PURSUANT TO RULE 29.6

Petitioner Cook Group, Incorporated is the parent corporation of the other petitioners herein. Cook Group, Incorporated has no parent corporation and there is no publicly held company owning ten percent or more of any of the petitioners' stock.

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Pursuant to Supreme Court Rule 15.6, Petitioners (collectively "Cook" or the "Cook Companies") hereby respond to the arguments first raised in the brief in opposition ("D. Br.") filed herein by Respondents Jon S. Wilson and Wiltek Medical, Inc. ("Defendants").

I. The Petition Presents a Clear Issue of Law Warranting this Court's Review, Not a "Discretionary" Decision Subject to an "Abuse of Discretion" Standard.

Cook asserts that Defendants' substitute processes were substantially equivalent to, and derived from, Cook's Trade Secrets 3 and 14, which Defendants were found to have wilfully and maliciously misappropriated from Cook. Cook further asserts that the lower courts erred in refusing to interpret the federal Injunction against Defendants' misappropriation in light of the doctrine of equivalents.

Defendants devote the bulk of their Opposition to arguing that this matter does not warrant review by this Court because the case allegedly presents a "fact-bound matter" subject to an "abuse of discretion" standard. Defendants' contention is without merit.[1]

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1. Defendants falsely accuse Cook of making "egregious misrepresentations" in its Petition. (D. Br. 1) Thereafter, Defendants principally cite a litany of *irrelevant* facts in their Opposition seeking to lay the misimpression that these "facts" were improperly omitted by Cook, e.g., that the courts below "only" found eleven Cook trade secrets (D. Br. 2) (nine of which, Defendants neglect to note, were found to have been wilfully and maliciously misappropriated by them). Additionally, Defendants take issue (D. Br. 2) with the statement in Cook's Petition (Pet. 5) that on the heels of his

(Cont'd)

Cook clearly set forth the legal issue presented in this case: whether federal courts are required to apply the doctrine of equivalents in determining if a party has violated a federal court order enjoining infringement of trade secret rights (as they are required to do when evaluating violations of injunctions governing patent rights). Notwithstanding Defendants' carefully phrased protestation that the Fourth Circuit did not refuse to "consider" application of the doctrine of equivalents (D. Br. at 10), there is no question that the Fourth Circuit clearly refused to *apply* the doctrine in this case. (App. 5a n.*) That refusal was clear error, and creates a conflict with other Circuit Courts of Appeals that requires this Court's intervention.

As set out in Cook's Petition, the Fourth Circuit's refusal to apply the doctrine of equivalents is contrary to the rules adopted in the Third, Seventh, Tenth, Eleventh, and Federal Circuits in intellectual property cases, and sets the Fourth

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(Cont'd)

resignation from Cook, Wilson and his new company, Wiltek, immediately copied Wilson-Cook's key product line. The product catalog pages of Wilson-Cook and Wiltek that were Exhibits to Cook's 1990 Complaint tried below prove that Wiltek's initial product line was stunningly similar to Wilson-Cook's established product line. (*See* Cook's Lodging Appendix filed contemporaneously herewith.) Finally, as to Defendants' claims that Cook's side-by-side confidential videotape filed under seal with this Court is somehow outside the record, Cook relies upon the Reply Appendix attached hereto, including the Fourth Circuit's Order allowing that videotape exhibit to be filed with it. The fact that the court below denied Cook's motion to display this videotape at oral argument (D. Br. 6, n.3) only underscores the error made by the court in refusing even to entertain oral argument as to the best evidence in the record demonstrating infringement and contempt under the doctrine of equivalents.

Circuit uniquely apart in cases involving contempt of federal court injunctions. In addition, the decision below flies in the face of this Court's 150-year history of embracing the doctrine of equivalents to prevent infringers (including malicious infringers such as Defendants) from rendering federal injunctions hollow and useless by adroitly further usurping intellectual property rights of the true owners. (Pet. 8-19)

Contrary to Defendants' contentions, since the Fourth Circuit reviewed this case without applying the correct legal standard, i.e., the doctrine of equivalents, its opinion is not entitled to review under a deferential abuse of discretion standard. *See Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 419 (1996) (Court of Appeals may review district court's denial of remittitur for abuse of discretion, but only if district court has first applied proper legal standard).

The cases on which Defendants rely are inapposite. With two exceptions, (*Harley-Davidson* and *Motorola*, discussed below), Defendants' cases, involving decisions of federal circuit courts reviewing district court contempt determinations, are not on point because they do not involve instances, such as the case at bar, where the incorrect legal standard was applied by the reviewing court.

For example, five of Defendants' cases involved claims of contempt sought against governmental entities where the lower courts simply refused to find the government defendants in contempt, and the reviewing courts found no cogent reason to disagree. *See Balla v. Idaho State Board of Corrections*, 869 F.2d 461, 466 (9th Cir. 1989) (affirming trial court's refusal to hold State Board of Corrections in contempt where Board had "complied fully" with all

enforceable elements of district court's order); *Davis v. Bowen*, 894 F.2d 271, 273 (8th Cir. 1989) (Secretary of Health and Human Services had "complied fully" with order entered respecting payment of plaintiff's disability benefits); *Dunn v. New York State Department of Labor*, 47 F.3d 485, 488 (2nd Cir. 1995) (affirming refusal to find contempt where defendant State Department of Labor was able to prove upward trend in rates of administrative review of unemployment claims that had been ordered, thereby satisfying both trial judge and reviewing court); *Langston v. Johnston*, 928 F.2d 1206, 1221 (1st Cir. 1991) (Massachusetts' compliance with a consent decree governing sexually dangerous persons was less than "perfect" but not contemptuous; trial court's construction should be accorded deference because of the "complicated, sometimes conflicting, policy objectives" involved in such public law questions); *Neely v. City of Grenada*, 799 F.2d 203, 207-08 (5th Cir. 1986) (affirming decision refusing to hold defendant governmental bodies and officials in contempt of a remedial racial discrimination injunctive order).

Defendants' other contempt cases add nothing helpful to their Opposition. *See In re General Motors Corp.*, 61 F.3d 256 (4th Cir. 1995) (involving direct contempt punished by court of appeals for violation of one of its own orders); *D. Patrick Inc. v. Ford Motor Co.*, 8 F.3d 455, 461 (7th Cir. 1993) (jurisdiction to enforce settlement agreement held insufficient "to transform the [settlement] agreement into a court order enforceable through a contempt proceeding"); *Joshi v. Professional Health Services, Inc.*, 606 F. Supp. 302, 306 (D.D.C. 1985) (refusing to find contempt of consent order which was drafted in such general and inexact language that plaintiff's contentions in effect were based on violations of imaginary requirements, not specific court orders).

Finally, Defendants' reliance on *Harley-Davidson, Inc. v. Morris*, 19 F.3d 142 (3d Cir. 1994) (D. Br. 8), is misplaced — indeed, the case is miscited by Defendants as a case in which a refusal to find contempt was affirmed. In actuality, the Third Circuit Court of Appeals in *Harley-Davidson* reversed the district court's denial of a motion for contempt of a consent decree, explaining that the "abuse of discretion" scope of review means that

> [t]he district court may be reversed only where the denial is *based on an error of law* or a finding of fact that is clearly erroneous.

Id. at 145 (emphasis added). In this case, application of the rule in *Harley-Davidson* supports reversal because of the Fourth Circuit's error of law in failing to apply the doctrine of equivalents.

For these reasons, this case may not be reviewed under an abuse of discretion standard, but should instead be remanded for the correct legal standard to be applied below.

II. The Standard Of Review Followed In The *Motorola* Case Should Have Been Applied Below.

As Cook demonstrated in its Petition, the Fourth Circuit clearly erred in failing to apply the standard of review followed in *Motorola, Inc. v. Computer Displays Int'l, Inc.*, 739 F.2d 1149 (7th Cir. 1984), which applied the doctrine of equivalents in interpreting a federal court order enjoining the further misappropriation of trade secrets. Defendants' attempts to distinguish *Motorola* are unavailing. At issue in *Motorola* was a cathode ray display monitor known as the

"DS" series, which involved Motorola's proprietary and confidential information. While the DS series line was being developed by Motorola, a high-ranking Motorola employee, Defendant Gatza, was terminated (like Defendant Wilson here). *Id.* at 1151. Rather than join another company, Gatza (like Wilson) immediately set up his own competing company, Defendant Computer Displays International ("CDI"). Two other former Motorola employees named as co-defendants (like certain other Cook employees here), resigned and joined Gatza's new company. Just as Defendants did in this case, Gatza and his cohorts immediately went to work copying products of their ex-employer, thus breaching their confidentiality contracts, and producing a monitor product, the MPG series, that misappropriated Motorola's trade secret information. *Id.* at 1152. Upon discovery of these breaches of trust, Motorola (like Cook) sued for misappropriation of proprietary and confidential information, breach of employment contracts, and other intellectual property violations.

After entry of a consent decree, Motorola inspected a prototype display monitor produced by Gatza's new company, CDI. Motorola (like Cook after its October 1, 1997 inspection of the Wiltek plant) then informed the defendants that it had found certain key elements of the "new" product (i.e., the circuitry used in CDI's new series of monitors) to be "essentially the same" as those used in the MPG series product, in violation of the injunction that defendants would not use or embody "Motorola information" in CDI's products.

The court of appeals rejected the defendants' claim in *Motorola* that the district court had "modified" the consent decree by finding the defendants in contempt of the

injunction. Instead, the Seventh Circuit found that the district court had merely interpreted the injunction, which prohibited CDI from using or selling the MPG monitor, to "mean that CDI could not sell [its] monitor or any monitor that was the 'same' as the MPG [monitor]." *Id.* at 1156. The Court of Appeals then went on to note that, while the trial court did not explicitly define what degree of "sameness" was barred by the consent decree:

> To say that the consent decree prohibited only the sale of a display monitor series identical to the MPG in all respects or with only minimal changes would make the injunction meaningless. . . . Moreover, this interpretation is in accord with trade secret law, which protects the holder of a trade secret from uses substantially derived from that secret. . . .
>
> The district court properly rejected CDI's approach in favor of a doctrine of equivalents analysis. . . .
>
> If an accused device "performs substantially the same function in substantially the same way to obtain the same result" as [a] patent claim, the patent is infringed. *Sanitary Refrigerator Co. v. Winters*, 280 U.S. 30, 42, 50 S.Ct. 9, 13, 74 L.Ed. 147 (1929). *See also Graver Tank & Manufacturing Co. v. Linde Air Products*, 339 U.S. 605, 608, 70 S.Ct. 854, 856, 94 L.Ed. 1097 (1950). . . . While the doctrine of equivalents is strictly a patent law doctrine, its usefulness in determining analogous trade secret cases had been noted and approved. *See Cataphote Corp. v.*

> *Hudson*, 442 F.2d 1290, 1294-95 (5th Cir.1970); *Bolt Assocs. v. Alpine Geophysical Assocs.*, 365 F.2d 742, 748 (3d Cir.1966). Cf. Restatement of Torts § 757, comment c. Use of the doctrine in a trade secret case is particularly appropriate where, as here, the parties have contracted through the consent decree to prohibit the manufacture and sale of a display monitor **substantially like** the "secret" monitor. Cf. *Bolt Assocs. v. Alpine Geophysical Assocs.*, supra, (doctrine of equivalents analogy useful where test is mechanical equivalence).

Id. at 1156-57 (emphasis added; citations omitted).

The pertinent provisions of the consent decree are set out *in haec verba* in the *Motorola* opinion. *Id.* at 1152. Importantly, the *Motorola* injunction did not expressly say that it prohibited use of any display monitor "**substantially like**" the prohibited monitor containing Motorola's proprietary information. Rather, that additional construction was provided by the Seventh Circuit's interpretation of the consent decree under the doctrine of equivalents so as to avoid rendering the injunction "meaningless" and to "protect[ ] the holder of a trade secret from uses *substantially derived* from that secret." *Id.* at 1156 (emphasis added).

The courts below in this case should have made the same analysis respecting Cook's Trade Secrets 3 and 14, but they failed to do so. The express refusal by the Fourth Circuit to apply the doctrine of equivalents is an error of law which should be reviewed by this Court *de novo* and corrected by remanding this case for a proper assessment applying that doctrine to determine whether Defendants are in contempt

of the Injunction as to Trade Secrets 3 and 14. That vital doctrine protects the "maintenance of standards of commercial ethics and the encouragement of invention" which stand at the crossroads of "the very life and spirit of the commercial world." *See Kawanee Oil Co. v. Bicron*, 416 U.S. 470, 481-82 (1974). There, the federal statutory law of injunction and contempt meet at a critical point on the landscape of intellectual property law, which Cook respectfully submits this Honorable Court should revisit after last traveling that road more than a quarter of a century ago. *Id.*

CONCLUSION

For the foregoing reasons, in addition to those stated in Cook's Petition, a Writ of Certiorari should be granted to review the decision of the Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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APPENDIX

APPENDIX A — MOTION OF PLAINTIFFS/ APPELLANTS FOR LEAVE TO FILE A VIDEOTAPE EXHIBIT AS A PART OF THE JOINT APPENDIX DATED FEBRUARY 9, 1999

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
No. 98-2831

Case No. B-93-50034 C-11W

In re:

JON S. WILSON,

Debtor

Adversary Proceeding
No. A-94-6010W

COOK GROUP INCORPORATED, WILSON-COOK MEDICAL INC., COOK INCORPORATED, VANCE PRODUCTS INCORPORATED, and SABIN CORPORATION,

Plaintiffs/Appellants,

vs.

JON S. WILSON,

Defendant/Appellee.

Appendix A

Adversary Proceeding
No. 6:90cv00260

WILSON-COOK MEDICAL INC.,

Plaintiff/Appellant,

vs.

WILTEK MEDICAL, INC.,

Defendant/Appellee.

MOTION OF PLAINTIFFS/APPELLANTS FOR LEAVE TO FILE A VIDEOTAPE EXHIBIT AS A PART OF THE JOINT APPENDIX

Plaintiffs/Appellants Cook Group Incorporated, Wilson-Cook Medical Inc., Cook Incorporated, Vance Products Incorporated and Sabin Corporation (collectively the "Cook Companies"), by their undersigned counsel, respectfully move pursuant to the Federal Rules of Appellate Procedure for leave to file (under seal) a videotape exhibit as part of the Joint Appendix. In support hereof, the Cook Companies respectfully allege as follows:

1. This case involves two trade secret processes (Trade Secrets 3 and 14) of the Cook Companies, which Defendants/Appellees were permanently enjoined from using under an Injunction entered in 1995. In 1997, after a surprise inspection of the manufacturing plant of Defendant Wiltek Medical Inc., the Cook Companies brought contempt

proceedings for Defendants/Appellees' continuing misappropriation of the Cook Companies' Trade Secrets 3 and 14.

2. In the proceedings below, the Cook Companies filed and displayed to the Bankruptcy Court and the District Court various videotapes comparing the Cook Companies' Trade Secrets 3 and 14 with the processes being used by Defendants/Appellees in 1993 and 1997, respectively, including a split-screen comparison videotape labeled in the District Court as Cook's Demonstrative Exhibit No. 1 which graphically displayed and tracked the two secrets at issue here.

3. Cook's Demonstrative Exhibit No. 1 compares on one side-by-side tape the relevant portions of PX 39A (a videotape taken at the Cook plant), and PX 39B (a videotape taken at the Wiltek plant), which exhibits were admitted into evidence during the 1995 [sic 1994] trial of this case, and the relevant portions of the videotape taken at Cook's 1997 surprise inspection of the Wiltek plant which was admitted below in the contempt proceeding as PX 2A. On several occasions during the proceedings below, all of the comparison videotapes admitted in evidence were played for, and viewed by, the Bankruptcy Judge, and the District Court viewed the entirety of Cook's Demonstrative Exhibit No. 1 during oral argument presented to him.

4. From the split-screen videotape which is Cook's Demonstrative Exhibit No. 1, this Court will gain a first-hand pictorial and graphical view of the two trade secrets at issue in this case as practiced at both the Cook and Wiltek plants.

Appendix A

To facilitate each member of the Panel being able to view this comparison videotape of Trade Secrets 3 and 14, the Cook Companies seek leave to file copies of Demonstrative Exhibit No. 1 under seal in this Court as part of each Joint Appendix hereby tendered to the Court. This videotape can be played on any ordinary VCR and has a total elapsed running time of 9 minutes and 23 seconds.

WHEREFORE, Plaintiffs/Appellants respectfully request that they be allowed to file the physical exhibit split-screen videotape, Cook's Demonstrative Exhibit No. 1, under seal with this Court as a part of each Joint Appendix filed with the Court.

Dated: February 9, 1999

Respectfully submitted,

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Appendix A

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APPENDIX B — REPLY OF PLAINTIFFS/ APPELLANTS IN SUPPORT OF THE MOTIONS FOR LEAVE TO FILE BRIEF AND JOINT APPENDIX UNDER SEAL AND FOR LEAVE TO FILE A VIDEOTAPE EXHIBIT DATED FEBRUARY 16, 1999

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
No. 98-2831

Case No. B-93-50034 C-11W

In re:

JON S. WILSON,

Debtor

Adversary Proceeding
No. A-94-6010W

COOK GROUP INCORPORATED, WILSON-COOK MEDICAL INC., COOK INCORPORATED, VANCE PRODUCTS INCORPORATED, and SABIN CORPORATION,

Plaintiffs/Appellants,

vs.

JON S. WILSON,

Defendant/Appellee.

Appendix B

Adversary Proceeding
No. 6:90cv00260

WILSON-COOK MEDICAL INC.,

Plaintiff/Appellant,

vs.

WILTEK MEDICAL, INC.,

Defendant/Appellee.

REPLY OF PLAINTIFFS/APPELLANTS IN SUPPORT OF THE MOTIONS FOR LEAVE TO FILE BRIEF AND JOINT APPENDIX UNDER SEAL AND FOR LEAVE TO FILE A VIDEOTAPE EXHIBIT

On or about February 9, 1999, Plaintiffs/Appellants Cook Group Incorporated, Wilson-Cook Medical Inc., Cook Incorporated, Vance Products Incorporated and Sabin Corporation (collectively the "Cook Companies"), filed, along with their Appeal Brief (i) a Motion for Leave to File the Brief and the Joint Appendix Under Seal and (ii) a Motion for Leave to File A Videotape Exhibit as Part of the Joint Appendix. On or about February 11, 1999, Defendants/ Appellees Jon S. Wilson ("Wilson") and Wiltek Medical, Inc. ("Wiltek") filed a response to the Cook Companies' motion to file their submissions under seal, in which Defendants inappositely assert that the Brief, the Joint Appendix, and the Videotape Exhibit do not need to be sealed because *Wiltek* has no trade secrets that will be disclosed,

and, thus, forever lost, in those submissions. Defendants' argument misses the point in one critical, and, ultimately, determinative, respect.

Regardless of whether Wiltek believes that its processes and equipment are trade secrets requiring protection from disclosure, *the Cook Companies are certain*, based on the permanent Injunction and the express findings of the Bankruptcy Court giving rise to the present contempt proceedings, that the Cook Companies' processes and equipment *are* trade secrets that would forever be destroyed if disclosed in publicly-available judicial filings. Indeed, it is precisely the concern for protecting the Cook Companies' adjudicated trade secrets that has led this Court, along with the courts below, consistently to receive ***all*** briefs, joint appendices and other materials filed in this action under seal. To alter this considered practice now — to "allow the light of day to shine on these proceedings," as Wilson and Wiltek put it — not only would seriously and irretrievably impair the Cook Companies' judicially-established trade secret rights in their adjudicated Trade Secrets 3 and 14 specifically described in the Cook Companies' Appeal Brief; but would render this appeal moot.

While Defendants suggest that the Cook Companies could file two videotapes — one showing the Cook Companies' processes (to be filed under seal) and one showing Wiltek's processes (to be publicly-available) — instead of the single side-by-side comparison videotape (Demonstrative Exhibit 1) actually submitted by the Cook Companies, Defendants conveniently ignore two essential points. First, the side-by-side comparison videotape was

accepted and viewed by the District Court in the course of considering the Cook Companies' appeal. Consequently, the side-by-side comparison videotape is independently relevant to this Court's review of the District Court's decision. Second, the crux of the Cook Companies' appeal is that the processes and equipment used by Wiltek on October 1, 1997 (the date of the Cook Companies' judicially-authorized, surprise inspection of the Wiltek plant) are, in fact, identical, or, under the governing doctrine of equivalents, substantially equivalent to, and/or substantially derived from the Cook Companies' adjudicated Trade Secrets 3 and 14. Thus, any public disclosure of Wiltek's processes effectively discloses the Cook Companies' trade secrets. Accordingly, like the Brief and the Joint Appendix, any videotapes (including the Cook Companies' Demonstrative Exhibit 1) must be filed under seal to assure that the Cook Companies' trade secrets are protected, and are not forever lost, pending this Court's decision on the merits of the present appeal.

Dated: February 16, 1999

Respectfully submitted,

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Appendix B

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APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT DATED AND FILED FEBRUARY 24, 1999

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 98-2831
(CA-96-657-2)

In Re: JON S. WILSON,

Debtor,

COOK GROUP INCORPORATED; WILSON-COOK MEDICAL, INCORPORATED; COOK INCORPORATED; VANCE PRODUCTS INCORPORATED; SABIN CORPORATION,

Plaintiffs - Appellants,

versus

JON S. WILSON; WILTEK MEDICAL, INCORPORATED,

Defendants - Appellees.

ORDER

Appellants have filed a motion for leave to file their brief and joint appendix under seal and a motion for leave to file a videotape exhibit as a part of the joint appendix. Appellees have filed a response to the motions, and appellants have filed a reply to the response.

Appendix C

The Court grants the motions. The brief and joint appendix are accepted for filing under seal.

For the Court

/s/ Patricia S. Connor
Clerk